

Claim No: 1092

Under the Weathertight Homes Resolution Services Act 2002

In the matter of an adjudication claim

Between **Auckland City Council (as assignee)**
Claimant

And **David Irwin**
First respondent

And **Paterson Cullen Irwin Limited**
Second respondent

And **Stuart Brentnall**
Third respondent

And **S J Brentnall Limited**
Fourth respondent

And **Carl Ruffels**
Fifth respondent

And **Auckland City Council**
Sixth respondent

**Final Determination
3 March 2006**

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2. **Summary**

2.1 The only remaining respondent, Stuart Brentnall, the third respondent, made a claim for costs against the Auckland City Council (**the Council**) as assignee of the claim and claimant under s43 of the Weathertight Homes Resolution Services Act 2002 (**the Act**).

2.2 The costs considerations in claims under s43 are analysed.

2.3 In the event the grounds for any costs order in favour of Mr Brentnall are not made out. The claims against him were not without substantial merit. They were not made in bad faith. In any event there is no evidence that he has incurred cost unnecessarily by virtue of those allegations.

2.4 The costs application is declined.

2.5 The determination in the Partial Determination is affirmed.

3. **The Costs Claim**

3.1 The third respondent, Mr S Brentnall, has made application for costs by memorandum dated 25 November 2005.

3.2 Mr Brentnall was the only remaining respondent against whom a claim was made. I dealt with the claim that was made against him in the Partial Determination dated 28 October 2005.

3.3 The claim for costs is made against the Council which had been the sixth respondent but which, in circumstances that I outlined in the Partial Determination, took an assignment of the adjudication claim under the Act from the original claimant, Mr K Gunji.

3.4 The application for costs is, as it should be, made pursuant to s43 of the Act which reads:

"43. **Costs of Adjudication Proceeding**

- (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by -
- (a) bad faith on the part of that party; or
 - (b) allegations or objections by that party that are without substantial merit.
- (2) If the adjudicator does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses."

3.5 The application for costs relies on both bases mentioned in s43(1)(a) and (b).

3.6 The total amount of costs incurred by Mr Brentnall has been \$45,495.79 and there have been invoices for the respective sums that make up this total submitted to me. These comprise legal costs as follows:

| | |
|---|---------------------------|
| Rennie Cox account dated 16 February 2005 | \$6,017.06 |
| Rennie Cox account dated 2 April 2005 | 2,914.88 |
| Rennie Cox account dated 22 August 2005 | 28,709.42 |
| Rennie Cox account dated 5 September 2005 | 6,664.74 |
| <i>Total</i> | <u><u>\$44,306.10</u></u> |

There is also the claim for an account from CoveKinloch Consulting Limited for \$1,189.69 which has the notation:

"To our services in relation to preparing evidence and attending litigation hearing for Gunjj [sic] vs Brentnall"

I am not aware of there being any involvement of the firm CoveKinloch Consulting Limited in the adjudication or the hearing. The invoice may relate to a witness but that is not clear – if it did, then it would need to be considered in the context of witnesses' expenses entitlements if at all. In

the absence of any particulars of that invoice I disallow it leaving a total claim of \$44,306.10.

- 3.7 The claim for costs relies first on the ground set out in s43(1)(b) referring to the way in which the claim was prosecuted against Mr Brentnall and the lack of articulated factual or legal basis for any claimed personal liability on his part and secondly, the ground in s43(1)(a), by reference to bad faith.
- 3.8 The application is opposed by the Council against which it is brought, the Council arguing that it is the allegations at the time they were made that must have been without substantial merit for s43(1)(b) to apply; that there were factual matters which required consideration at a hearing and that it is not the ultimate determination of liability that is the determinative factor but rather the allegations at the time they were made. Bad faith is expressly denied.

4. **Costs Considerations**

- 4.1 The submissions for the Council claim that the provisions for costs recovery in s43 of the Act are different from the costs régimes that apply in the High and District Courts and that any award of costs based on the ultimate outcome would "turn the special costs régime in this jurisdiction on its head, with liability being determined by the final outcome, rather than the initial allegations".
- 4.2 In my view the only jurisdiction for an adjudicator to award costs is found in s43 and Mr Brentnall must qualify for an award under that section if there is to be any such.
- 4.3 It is important to remember the provisions of subsection 43(2) that if a determination is not made that costs and expenses must be met by any of the parties to an adjudication then the parties must meet their own costs. The Council submits that is the starting point and I accept that. Parties who are involved in adjudication claims under the Act must realise that

unless they can show an entitlement to an order for costs under s43(1) they will be meeting their own costs. This applies to claimants as well as to respondents.

4.4 Dealing with the component elements of s43(1), there seems to be this process required:

4.4.1 A party must have caused costs and expenses to be incurred. The section is silent as to the party who must have incurred those costs and expenses but presumably that is the party making the claim.

4.4.2 Those costs must have been incurred unnecessarily.

4.4.3 Those unnecessary costs must have been incurred by either:

4.4.3.1 bad faith on the part of the party against whom costs and expenses are claimed; or

4.4.3.2 allegations or objections without substantial merit.

4.4.4 Having reached the conclusion that that party has caused those costs and expenses to be incurred unnecessarily by either bad faith or allegations or objections without substantial merit or both, a **discretionary** determination that costs and expenses be met by any of the parties to the adjudication whether those parties are or are not on the whole successful in the adjudication. The word **may** is used which makes the matter discretionary in any event. It is also important to note that a successful party could be in appropriate circumstances the subject of a determination for costs. It is also noteworthy that the section does not refer to part only of the costs and expenses incurred. The section differentiates between whole or partial success but not whole or partial costs. It may be in an appropriate case that only part of costs incurred can

be shown to have been caused by bad faith or allegations or objections without substantial merit or both and in my view it would be appropriate for a determination of costs for that part only.

- 4.5 The essentials in this case relate to a claim against an individual personally where the company with which he was associated was the contract builder. In the event no claim was made against the contract builder, S J Brentnall Limited. The question hinged around the duty of care (if any) owed by Mr Brentnall personally and whether he had breached that. One of the factors to be considered in claims of that nature where there is a limited liability is the extent of control. To use the language of *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517, there can only be an assumption of responsibility to the extent that circumstances allow that and there may well be cases where the chain of authority is so long that a person working on site has virtually no opportunity to assume responsibility. That person may be the subject of very direct and express directions from persons having greater authority and able to assume more responsibility. Any claim against a person in that position, such as a labour-only carpenter directly responsible to a subcontractor or head contractor must be carefully considered in the context of whether there is any prospect of success and whether the claim has, to use the words of s43, substantial merit.

5. **Costs of this Case**

- 5.1 The case is perhaps unusual in that it started as a claim by Mr Gunji personally and included the six named respondents. There was, in circumstances outlined in the Partial Determination, the assignment to Auckland City Council of the claimant's claims including his claims against Mr Brentnall. The Council took the risk on the prospect of success in that claim in taking the assignment that it did. As I said in the Partial Determination I do not regard that process as improper. What it meant, however, was that whereas the witness statements that had originally been provided by Mr Gunji were directed to the liability of all parties including the

Council as sixth respondent, when the hearing took place the emphasis was solely against Mr Brentnall's liability. It meant that witnesses who had been intended to be called for Mr Gunji were in fact called for Brentnall because their witness statements were addressed to the liability of other parties and Mr Brentnall's purpose in calling them as witnesses was to emphasise the liability that other parties had to the claimants which went to minimise his liability. The emphasis of the claim as it had appeared in preliminary stages changed by the time the hearing arrived.

- 5.2 The second unusual factor is that from the outset Mr Gunji said he was not making a claim against Mr Brentnall personally but only against the company, S J Brentnall Limited, the fourth respondent. The Notice of Adjudication was ambiguous in referring to those parties as:

"Stuart Brentnall, S J Brentnall Limited (Builder)"

The matter was raised in early stages and on 4 February 2005 Mr Brentnall's solicitors expressly stated that it was his intention:

"... to proceed against Paterson Cullen Irwin Limited [second respondent] and S J Brentnall Limited and not Mr Irwin [first respondent] and Mr Brentnall personally."

- 5.3 That was confirmed in a memorandum dated 7 February 2005 where formal notification was given that Mr Brentnall could be struck out as a respondent because no claim was made against him personally. The Council, however, took a different view and sought to have Mr Brentnall remain in the proceeding and that matter was duly dealt with. For Mr Brentnall it is now argued that it was only because of the Council's request that Mr Brentnall remain personally as a respondent that that occurred at the time and that, but for that intervention by the Council, Mr Brentnall would have been struck out as a respondent. That does not necessarily follow. The ground for striking out a respondent is if it is "fair and appropriate in all the circumstances" (s34) and there are considerations of cross-claims that respondents may make against other respondents which an adjudicator has a discretion to determine under s29 of the Act. The

process of joining and striking out respondents is a fluid one depending on the circumstances at the time and the information that is available from time to time. It is quite conceivable that, even if Mr Brentnall had been struck out as a respondent at that time, application may have been made to have him added later on the grounds set out in s33 of the Act. The fact that the claimant did not at that stage want to make a claim against Mr Brentnall but the Council did by way of cross-claim is not a significantly unusual factor in a claim under this Act. The identity of a party or parties seeking to include a respondent in a claim by way of applying to join that party or opposing a striking out of that party as a respondent is a factor, but not necessarily the only factor, relevant to questions of any liability for costs. In each case it is necessary to consider the express provisions of s43 which I have attempted to analyse above.

- 5.4 It is noteworthy that despite what Mr Gunji through his solicitors had said about a claim against Mr Irwin personally, Mr Irwin remained as a respondent and I had occasion in the Partial Determination to consider issues of his personal involvement in the claim.
- 5.5 The reality in this case is that Mr Brentnall was a director of S J Brentnall Limited and very closely associated with it. He was not of such remote connection of the kind mentioned in paragraph 4.5 above that there was significantly little prospect of his having an opportunity to assume responsibility.
- 5.6 I considered in the Partial Determination the respective roles of the individuals working on site and adopt again what I said there about their activities and the extent of the respective duties of care that were owed independently of contract.
- 5.7 In this case there was a substantial claim made against the contract builder, S J Brentnall Limited. Expert evidence proposed from the claimant related to significant breaches of standards by that builder. There were

contractual obligations that it had. Questions were also raised as to whether it had any further obligation under a duty of care. Eventually claims were made against Mr Brentnall personally based on his close involvement with the company and on what was known about his involvement on site. Questions arose as to whether the facts supported a claim that he personally owed a duty of care to Mr Gunji quite apart from any contractual (or possibly tortious) obligations owed by the contract builder, S J Brentnall Limited.

- 5.8 It was because of the background factual matrix to those issues that I declined Mr Brentnall's applications to be struck out as a respondent during preliminary phases and at the outset of the hearing. Had there been less of a connection between him and the company then it might have been more obvious that claims against him would not succeed and the ground in s34 be made out that it was fair and appropriate that he be struck out as a respondent. That was not, however, the case and I declined his applications.
- 5.9 In the event, having heard all the evidence and submissions, I reached the conclusions that I did in the Partial Determination that he personally had no liability to the claimant in this matter. That is not synonymous with saying the claims against him did not have substantial merit and it was only after having heard all the evidence that I came to the conclusions that I did.
- 5.10 Another factor is that, to qualify for an order for costs under s43, the party claiming must show that the costs have been incurred unnecessarily by the allegations made. In this case S J Brentnall Limited and Mr Stuart Brentnall were both represented in early stages by the same counsel and both defended the claims. When the hearing commenced counsel for Mr Brentnall appeared but not as representing S J Brentnall Limited. It might be fair to assume that until that point counsel representing both Mr Brentnall and the company were mindful of, and taking active steps to defend, the claims against the company just as much as Mr Brentnall. In

that case the costs would have been incurred with that particular counsel (and solicitors) in any event. It is impossible for me to say that there is an element of the costs claimed that relates solely to Mr Brentnall's position and to representation of him.

5.11 For these reasons I have concluded that the grounds under s43 have not been made out. Certainly there is no bad faith in what has occurred. The claims that were made against Mr Brentnall personally did, at the time they were made, have sufficient merit that they needed to be explored and considered. I am not persuaded that Mr Brentnall incurred costs unnecessarily because of the allegations having been made nor that those allegations were without substantial merit. Accordingly I decline the application.

6. **Result**

6.1 The application for costs by Mr Brentnall is declined.

6.2 The conclusions I reached in the Partial Determination are now affirmed and this disposes of this claim.

6.3 Again because I have not found any party liable to make a payment I have not included any statement under s41(1)(b)(iii) of the Act.

DATED the 3rd day of March 2006

David M Carden
Adjudicator